STATE OF MICHIGAN
IN THE SUPREME COURT

MELISSA MAYS, MICHAEL ADAM MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN, and RHONDA KELSO,

Plaintiffs-Appellees,

v

GOVERNOR RICK SNYDER, STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, and MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants.
_____/

Supreme Court No. 157335

Court of Appeals No. 335555

Consolidated with Docket Nos. 335725 and 335726

Court of Claims No. 16-000017-MM

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

REPLY BRIEF OF STATE DEFENDANTS-APPELLANTS

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Plaintiffs do not deny the obvious importance of this case to Michigan's jurisprudence. They agree (at 19) that the Court of Appeals recognized a constitutional tort based on a substantive-due-process theory. They agree (at 20) that the Court of Appeals applied an exception to MCL 600.6431 that is based in caselaw to "relieve" them "from the requirements of [that statute]"—in other words, they admit that the lower court allowed a judicially created equitable exception to override the statute's plain text. And they urge (at 62) that an inverse-condemnation claim may proceed on a city-wide basis, thus committing the task of remedying Flint's alleged water problems to the Judiciary, instead of to the Legislature. Because they cannot deny the importance of this case, they instead simply address the merits, but as shown below, those arguments all fail.

I. Plaintiffs fail to demonstrate that their claims are timely.

A. Plaintiffs cannot backfill the holes in their claims with hypothetical claims of non-parties.

Plaintiffs here are *not* thousands of unknown putative class members. (Answer, pp 22–26.) Plaintiffs are ten people, *none of whom* allege that he or she had an elevated blood lead level or that he or she contracted Legionnaires' disease. Their complaint plainly states what their alleged harms were, when those alleged harms occurred, and shows that Plaintiffs had reason to know of the alleged harms much longer than six months before they filed suit. (App, pp 20–33.)

Recognizing the risk of relying on their own claims, Plaintiffs instead rely on the hypothetical claims of the unnamed members of their putative class. They argue that it would be "premature" to adjudicate whether they have complied with MCL 600.6431 because it is "impossible" to know at this point when each of the thousands of members of their proposed

class were first harmed. (Answer, pp 22–26.) Both the Court of Claims and the Court of Appeals allowed Plaintiffs to use this tactic. (Ex 1 of App, Op at 9.) This Court should reject this approach because it is contrary to law.

A plaintiff "may not pursue a cause of action in a class that one could not pursue individually." *Cork v Applebee's of Michigan, Inc*, 239 Mich App 311, 319 (2000). That is because the plain language of MCR 3.501(A)(1) requires the "representative parties" in a putative class action to be "members of [the] class" they seek to represent. See *Grigg v Michigan Nat'l Bank*, 405 Mich 148, 170 (1979). Since the claims of Plaintiffs are time-barred, it does not matter that Plaintiffs have not moved for class certification—their lawsuit must be dismissed. See *Carter v W Pub Co*, 225 F3d 1258, 1263 (CA 11, 2000), citing *Great Rivers Co-op of Se Iowa v Farmland Indus, Inc*, 120 F3d 893, 899 (CA 8, 1997); *Henry v Dow Chem Co*, 484 Mich 483, 499 (2009) (noting that Michigan courts look to federal cases for class-action issues because the state and federal rules "are nearly identical").

Moreover, Plaintiffs' compliance with MCL 600.6431 *cannot* be an issue of fact. Compliance with MCL 600.6431 is a threshold legal matter Plaintiffs must satisfy before their suit can proceed. (App, pp 22–23.) Therefore, if Plaintiffs did not "state[] the time when . . . such claim arose" as they were required to by MCL 600.6431(1), that failure is an independent basis to dismiss their complaint. See *Fairley v Dep't of Corrections*, 497 Mich 290, 298–300 (2015); *Reich v State*, 5 Mich App 509, 513 (1967) ("We cannot supply the missing essential date, and its omission is fatal to the appellants' claim.").

Finally, this Court rejected the Court of Appeals' bifurcation of Plaintiffs' property-damage claim nearly the same day the Court of Appeals performed the bifurcation. (Ex 1 of App, Op at 9); *Henry v Dow Chem Co*, 905 NW2d 601 (Mich 2018). Plaintiffs' claim arose

when their property was damaged, not when the public "discovered" the damage. *Id*. The record, including Plaintiffs' own pleadings, demonstrate that Plaintiffs' property-damage claims arose much longer than six months before they filed suit. (App, pp 10–12, 28–30).

B. Plaintiffs' claims are untimely even under their "multiple event" theory.

Plaintiffs argue that they have multiple independent causes of action because "each day" the City of Flint was using Flint River water was a "separate 'event' for purpose[s] of triggering the Court of Claims notice requirement." (Answer, p 26 n 30.) But that is a near verbatim recitation of the abrogated "continuing violations doctrine," which was that "a separate cause of action can accrue each day that defendant's tortious conduct continues." *Dep't of Environmental Quality v Gomez*, 318 Mich App 1, 26 (2016), citing *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263 (2005). The plain language of the notice provision is what governs, and it required Plaintiffs to either file suit or provide notice "within 6 months following the happening of the event giving rise to the cause of action." MCL 600.6431(3). Plaintiffs' alleged causes of action are invasion of their bodily integrity (First Amend Compl, ¶¶ 140–146) and inverse condemnation (*id.*, ¶¶ 149–154). Plaintiffs allege that the event that gave rise to each of those causes of action was when they and their property were "exposed" to "toxic" Flint River water. (*Id.*, ¶¶ 7–9, 119–120, 142–143, 150.) According to *Plaintiffs' own complaint*, that event occurred on April 25, 2014, when they "were . . . injured in person and property because they were exposed to highly dangerous conditions." (*Id.*, ¶ 7.)

True, the abrogation of the continuing-violations doctrine does not prevent suits for later, independent causes of action that are timely filed. *Garg*, 472 Mich at 286. Plaintiffs argue that they have four independent causes of action that arose within six months of the date their complaint was filed. (Answer, pp 26–29.) But Plaintiffs' four proposals are attempts to reset the

clock on existing harms. As Plaintiffs repeatedly insist, and this Court confirmed in *Henry*, 905 NW2d 601, and *Frank v Linkner*, 894 NW2d 574, 582 (Mich 2017), a cause of action is created when the plaintiff is harmed, *not* when the defendant acted. (Answer, pp 22–23, 37.) Plaintiffs' four proposals violate this rule and attempt to rely on the continuing-violations doctrine.

First, Plaintiffs concede that they were allegedly harmed by E. coli and TTHM exceedances more than six months before they filed suit, but that "tortious conduct" related to "lead and legionella contamination" are separate events and occurred within six months of their suit. (Answer, p 27.) Yet *no Plaintiff* alleges that he or she had elevated blood lead levels.[1] Moreover, Ms. Mays' and Trachelle Young's previous lawsuit, which they filed *more than six months before this one*, sought damages for lead exposure, alleging that their experts did not believe Flint had treated water properly to prevent corrosion. (Dkt Entry 68, ¶¶ 42–45; Dkt Entry 69, ¶¶ 48, 85–87, 108.) Plaintiffs' own complaint also shows that the draft internal U.S. EPA memo related to lead contamination in Flint—which the EPA advised DEQ to disregard—

[1] Plaintiffs rely on a 2014 study by Hurley Medical Center researchers comparing a nine-month period before the water switch to a nine-month period after the water switch to justify their repeated argument that "large segments of Flint" were "poisoned" by lead. (Answer, pp 1, 16.) Yet different Hurley researchers recently reviewed **the same data**, but expanded the timeframe from two to 11 years, and compared the results to other locations in Michigan. They concluded that the rise in blood lead levels in Flint was **not statistically significant during the water switch**. Hernán F. Gómez, et al, *Blood Lead Levels of Children in Flint, Michigan: 2006–2016*, Journal of Pediatrics, March 15, 2018, p 3, <https://www.jpeds.com/article/S0022-3476(17)31758-4/pdf>. Instead, blood lead levels in Flint during the switch remained significantly lower than the most populated areas of Michigan. *Id*. at 5. As a result, the minor changes in blood lead levels in Flint during the water switch "did not meet the level of an environmental emergency." *Id*. at 4. Because of this information, Hurley doctors voted at their annual meeting recently to "discontinue the term 'poisoned' . . . when referring to the elevated lead levels . . . during the water switch." (Ex 6, Announcement.) They concluded that "[n]ot a single child in the City of Flint has been lead poisoned from the water switch." (*Id*.) For this reason, "the children of the City of Flint and their families should stand assured that they are okay. They were not poisoned and therefore they don't have to be burdened by the stigma that the 'poisoning' label brings to mind." (*Id*.)

was widely published on July 9, 2015, *still* six months before this suit. (First Amend Compl, Ex A, App V, p 13.)

As for Legionella, *no Plaintiff* alleges that he or she contracted Legionnaires' disease. The one person they allege contracted Legionnaires' disease, Robert Skidmore (Answer, p 23), is not one of the Plaintiffs and is not even a member of their putative class because his estate is represented by a different attorney—something Plaintiffs' counsel recognized as recently as March 13, 2018. (Ex 1, 3/18/2018 Motion, n 3; Ex 2, 4/9/2018 Counter-Motion.)

Second, Plaintiffs argue that a new event—the State not requiring Flint to return to Detroit water—reset the clock on their existing harm each day after July 15, 2015. (Answer, p 28.) This is both an attempt to rely on the continuing-violations doctrine discussed above and violates the established rule that a cause of action is created when a plaintiff is harmed, not when a defendant acts (or in this case, allegedly fails to act). *Frank*, 894 NW2d at 582.

Third, Plaintiffs argue that two more new events occurred that reset the clock on their existing harm, first when the DEQ disagreed with the sampling results performed by Virginia Tech, and second during the six days when DHHS disagreed with the blood lead level results reported by Hurley Medical Center researchers. (Answer, p 29.) Yet no Plaintiff alleges that he or she started drinking the water again during those times or somehow experienced a new and independent harm because of those temporary disagreements. Instead, Plaintiffs attempt to start the clock not when they were *harmed*, but when State Defendants allegedly *acted*. Moreover, Plaintiffs' endeavor to base their cause of action on the State's review of announcements by *non-parties* Drs. Edwards and Hanna-Attisha is a forbidden attempt to resurrect their "fair and just treatment" claim. (First Amend Compl, ¶¶ 147–148.e.) Plaintiffs abandoned that claim below

after the Court of Claims dismissed it and cannot raise it now. (Ex 1 of App, Op at 6 n 2); see *People v McGraw*, 484 Mich 120, 131 n 36 (2009).

Finally, Plaintiffs argue that another new event occurred that reset the clock on their existing harm when Adam Rosenthal, Stephen Busch, Michael Prysby, and Nancy Peeler allegedly performed criminal acts "through on or about August 2015." (Answer, p 29; Ex 4 to Answer.) Again, this is Plaintiffs' attempt to start their clock when someone *acted* rather than when they were *harmed*. Additionally, Plaintiffs refer to these four individuals as "Defendants." (*Id*.) But they are *not* Defendants in this suit. Plaintiffs have *already sued* those individuals in different courts. (Exs 3–4.)

C. The equitable exceptions to MCL 600.6431 the Court of Appeals created do not apply and would not help Plaintiffs if they did.

Neither a "harsh and unreasonable" nor "fraudulent concealment" exception apply to the notice provision based on this Court's decisions and the plain language of the Court of Claims Act. (App, pp 18–33.) Moreover, those exceptions would not help Plaintiffs even if they did apply. (*Id*., pp 28–30, 32–33.) Plaintiffs do not rebut these arguments. They fail to square the Court of Appeals' conclusion that Plaintiffs' potential claims were "not readily apparent" with the record in this case, which demonstrates the opposite. (App, pp 28–30.) Nor do Plaintiffs even attempt to show that they 1) had no reason to know of a potential claim; 2) the State knew of a potential claim and mandated DEQ staffers to keep that knowledge from Plaintiffs; and 3) Plaintiffs would have timely filed their claims had the State not acted. See *Doe v Roman Catholic Archbishop of Archdiocese of Detroit*, 264 Mich App 632, 643–647 (2004) (identifying the narrow circumstances under which "fraudulent concealment" would toll a limitation period). Indeed, Ms. Mays and Ms. Young had *already filed* the first of five lawsuits they have filed

related to Flint water issues on June 5, 2015, *before* any of the allegedly criminal acts of DEQ staffers in "August 2015" discussed above. Plaintiffs object that State Defendants "sandbagged" them by bringing their previous suit to the attention of the Court of Appeals (Answer, p 34), but it was publicly filed by *their lead plaintiff and lead attorney*. What was inappropriate was Plaintiffs' attempt to keep knowledge of the lawsuit from State Defendants and the Court.

II. Plaintiffs' attempt at imposing vicarious liability on State Defendants highlights the weakness of their constitutional tort claims.

State Defendants are Governor Snyder in his "official capacity"—which Plaintiffs claim is just "a suit against the State" (Answer, p 56)—the State of Michigan, the Department of Environmental Quality, and the Department of Health and Human Services. State Defendants are *not* individuals such as Bradley Wurfel, Stephen Busch, Patrick Cook, Adam Rosenthal, Liane Shekter-Smith, Michael Prysby, Nancy Peeler, Robert Scott, or Corinne Miller. Yet Plaintiffs repeatedly refer to those individuals as "Defendants" throughout their briefing. (E.g., Answer, pp 1–18, 26–29.) Plaintiffs' belief that "the State" and "anyone employed by the State" are interchangeable highlights the weakness of their constitutional tort claims.

Justice Boyle in *Smith v Department of Public Health*, 428 Mich 540 (1987), explained that the State's immunity cannot be avoided with respondeat superior liability. Instead, "liability should only be imposed on the state in cases where a state 'custom or policy' mandated the official or the employee's actions." *Id.*, at 642–643. Plaintiffs attribute the alleged criminal actions of individuals to the State throughout their brief, going so far as to characterize those criminal charges as part of this case's procedural history. (Answer, pp 19–20.) Yet Plaintiffs identify no state custom or policy that *mandated* that those individuals commit allegedly criminal acts or *mandated* that those individuals allow Flint to expose Plaintiffs to undertreated water.

Simply stating that individuals acted "in their official capacity" (Answer, p 49 n 53) falls far short of pleading "facts" in avoidance of the State's immunity. See *Mack v City of Detroit*, 467 Mich 186, 198–199 (2002).

The truth is that Plaintiffs have already sued the individuals they blame for their alleged injuries. (Exs 3–4.) Since, as Plaintiffs acknowledge, their state due-process rights are coextensive with their federal due-process rights (Answer, p 56), they can already seek damages for a violation of those rights in their federal court action based on 42 USC 1983. Plaintiffs' claim that the availability of other remedies is merely one "factor" for the Court to consider is incorrect. (Answer, p 50.) This Court made that factor a *requirement* when it held that "*Smith* only recognized a narrow remedy against the state *on the basis of the unavailability of any other remedy*." *Jones v Powell*, 462 Mich 329, 337 (2000) (emphasis added). That Plaintiffs have multiple other remedies available to them defeats their constitutional tort claim. *Id.*

III. Emergency managers are more like court-appointed attorneys than court-appointed receivers.

Plaintiffs largely repeat the arguments of the Emergency Manager Defendants in their answer, to which State Defendants already replied. (4/26/2018 State Defs' Reply to EMs.) But one unique argument Plaintiffs make is that "the question with regard to who benefits is irrelevant" in the case law holding that court-appointed receivers are arms of the appointing court. (Answer, p 46.) That is incorrect. The *reason* courts held that court-appointed receivers are arms of the court is because they, like the court, "stand[] in an indifferent attitude, not representing the plaintiff or the defendant." *In re Guaranty Indemnity Co*, 256 Mich 671, 673 (1932). That is not true for emergency managers. They are not a neutral, indifferent party. They exist "to assure . . . the local government's capacity to provide or cause to be provided necessary

governmental services essential to the public health, safety, and welfare." MCL 141.1549(2). That is why they are authorized only to "act for and in the place and stead of the governing body and the office of chief administrative officer of the local government." *Id*. If Plaintiffs insist on analogizing emergency managers to the judicial system, then emergency managers are more like court-appointed attorneys than court-appointed receivers. Though appointed by the court, a court-appointed attorney acts for his or her client, *not* the appointing court.

IV. Plaintiffs fail to show that the Court of Appeals' unconfined discussion of inverse condemnation does not violate the separation-of-powers doctrine.

This Court established principles to ensure that courts do not allow inverse condemnation claims to violate the separation-of-powers doctrine, and the Court of Appeals violated those principles. (App, 48–50); *Spiek v Michigan Dep't of Transp*, 456 Mich 331, 348–349 (1998). Plaintiffs have no response to that argument. Instead, Plaintiffs persist in making three errors. First, Plaintiffs ignore the difference between State Defendants and Emergency Managers Defendants. (Answer, pp 60–65.) But even if this Court were to find that the Court of Claims has jurisdiction over the Emergency Managers, it does not mean their decisions are attributed to the State of Michigan. The Emergency Managers were authorized to act only on behalf of the City of Flint for the City's benefit, as explained above. MCL 141.1549(2). That is why the City is required to insure, defend, and indemnify them, just as it would a mayor or police chief. MCL 141.1560(4) & (5).

Second, Plaintiffs assume the Court looks only to their complaint rather than the record, but when a plaintiff attempts to assert a claim against the State in avoidance of its immunity, courts do not accept allegations as true that are contradicted by the record. See *Maiden v Rozwood*, 461 Mich 109, 119 (1999). Here, Plaintiffs ignore the very materials they attached to

their complaint that show that the *City of Flint* decided what its water source would be, a fact acknowledged by counsel to Emergency Manager Defendants at oral argument below. (App, pp 4–5, 48.) The City even acknowledged that fact in its formal notice of intent to sue the State of Michigan filed in the Court of Claims. (Ex 5, City's notice of intent.) State Defendants do not dispute that DEQ played a regulatory and advisory role in the decision, but that is the same role DEQ would have played under the Safe Drinking Water Act if *any* major city in the state planned to switch its primary source. See, e.g., MCL 325.1003b.

Finally, Plaintiffs fail to show how having "water service lines and plumbing susceptible to damage by corrosive water" (First Amend Compl, ¶ 154) is "unique" under *Spiek* when *all* water service lines and plumbing are susceptible to damage by corrosive water. That is like an electrical system customer alleging that the harm caused to her wiring by a power surge was "unique" under *Spiek* because her wiring was susceptible to damage by power surges. Furthermore, the separation-of-powers concerns this Court raised in *Spiek* are even more pronounced here because unlike the relatively small number of people who live alongside a freeway, most inhabited property in Michigan is connected to a municipal water system. The Court of Appeals' unconfined holding will lead to a "harm . . . shared in common by many members of the public" entering into "the judicial realm"—which is what this Court sought to avoid. *Spiek*, 456 Mich at 349.

CONCLUSION AND RELIEF REQUESTED

State Defendants request that the Court grant them the relief they requested in their application.

Respectfully submitted,

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